IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 346 OF 2007

Atmaram Bapu Sawant ... Appellant

Versus

Krishna Balwant Sawant & Ors. .. Respondents

Mr. Sandesh D. Patil, Advocate, for the appellant.

CORAM: J.H.BHATIA,J.

DATE : 20th September, 2007

P.C.

1. Heard learned Counsel for the parties.

2. The appellant is the original defendant No.1. The respondent No.1 is the original plaintiff. He filed Regular Civil Suit No.80 of 1995 seeking partition and 1/4th share in the agricultural land as well as six house properties bearing Nos. 144,212, 213, 214, 215 and 218. The defendants contested the suit and contended that the house property Nos.212 to 215 and 218 are their self-acquired property as they had constructed the same with their self income.

3. The trial Court framed issued No.6 on this pleading and gave a finding that the properties are

ancestral, but are developed by the defendant No.1. In para 24 of the judgment, the trial Court observed "Absolutely there is no evidence on record to prove the defendant No.1 constructed these houses from his self income. But once he is in service it presumed he is having self-income. Therefore I presume these property is developed from his own fund and the property and it is proper to put these properties in his share..." The trial Court held that the plaintiff is entitled to 1/4th share and defendant No.1 is entitled to 1/2 share in the suit property. In para 4 of the operative part of the order, the trial Court said "The property No.212 to 215 and 218 be put into share of deft No.1." The original plaintiff preferred an appeal,being Regular Civil Appeal No.131 of 2002 challenging the evidence on issue No.6 and the final order is based on the same.

4. The learned appellate Court allowed the appeal. Therefore, the legal heirs of original defendant No.1 have preferred this Appeal. It is contended that the appeal itself is not tenable because no appeal could be preferred against a mere finding which does not amount to res judicata against the party.

5. The learned appellate Court after quoting para 24 of the judgment of the trial Court, observed as under :

> "It is really ridiculous to have a conclusion that only because there is a pleading the Court should accept the same without there being any supporting evidence and particularly when the learned Trial Court has itself recorded a finding that absolutely there is no evidence on record to prove that the defendant No.1 has constructed these houses from his self income..."

The learned appellate Court, while maintaining the shares as decided by the trial Court, directed that the agricultural property be partitioned by the Collector or any of his Gazetted subordinate as per section 54 of the Civil Procedure Code and the partition of the house properties be made on appointment of the Court Commissioner, if applied for. Thus, the appellate Court set right the record.

6. The learned Counsel for the appellant only contended that appeal cannot be preferred merely if there is a finding which does not amount to res judicata. In the present case, the trial Court has given a finding that the house property Nos.212 to 215 and 218 are self-developed and this self-acquired properties of the defendant No.1 and on that basis he

also directed that these properties be put in possession of the defendant No.1. This is bound to adversely affect the plaintiff because in the partition which may take place during the execution of the decree, he will be completely deprived of claiming any share in those houses. This could not be rectified without filing an appeal. No other point is raised.

7. In view of the facts and circumstances,I find no substantial question of law involved in the matter.

The Appeal stands dismissed.

8. As the Appeal itself is dismissed, the Civil Application NO.692 of 2007 does not survive and it stands disposed of accordingly.

(J.H.BHATIA,J.)